

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Bradley R. Thayer and Judith N. Thayer,

Debtors.

Chapter 7 Bankruptcy

Bky 04-32735 (GFK)

In re:

American Residential Mortgage, LP

Plaintiff

Adv 04-3338

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

To: United States Trustee and other entities specified in Local Rule 2002-1(b).

1. American Residential Mortgage, LP ("ARM") the Plaintiff in the above-referenced adversary proceeding, moves the Court for an order dismissing Defendants' counterclaims.

2. The Court will hold a hearing on this motion at 3:00 p.m. on October 25, 2004 in Courtroom No. 228B, United States Courthouse, 700 Federal Building, 316 North Robert Street, St. Paul, MN 55101.

3. Any response to this motion must be filed and delivered not later than October 18, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than October 15, 2004, which is ten days before

the time set for the hearing (excluding Saturdays, Sundays, and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. This proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The petition commencing this Chapter 7 case was filed on May 5, 2004 (the “Filing Date”).

5. This motion arises under Fed. R. Bankr. P. 7012(b). This motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 9013-1 through 3. Movants request an order dismissing Defendants’ counterclaims.

Defendants’ Version of the Facts

6. On September 11, 2002, Defendants executed a note in favor of ARM in the original principal amount of \$157,700 (the “TCF Note”). Pursuant to a Mortgage dated September 11, 2002 and signed by both Defendants (the “TCF Mortgage”), the TCF Note was secured by the Defendants’ residence and shortly thereafter was assigned to TCF Mortgage Corporation (“TCF”). Joint Answer and Counterclaims of Bradley R. Thayer and Judith N. Thayer (the “Answer”), ¶ 7.

7. On August 25, 2003, Defendant Bradley Thayer signed a new note in the principal amount of \$170,000 and both Defendants executed a new mortgage with ARM. The proceeds of the new mortgage were to be used, in part, to pay the entire outstanding balance of on the TCF Note (the “Cancelled Loan”). Answer ¶ 10.

8. On August 28, 2003, under 12 C.F.R. § 226.23 (Regulation Z), the Defendants rescinded the new ARM loan by signing the Notice of Right to Cancel and mailing the

cancellation to ARM. Answer ¶ 61. ARM does not dispute that the Cancelled Loan was properly rescinded.

9. Defendants commenced the above-captioned Chapter 7 case on May 5, 2004. In the their bankruptcy schedules, Defendants listed Truth in Lending Act (TILA) claims against ARM as an asset. The scheduled claims included, “claims arising under the Truth in Lending Act, 15 U.S.C. 1601 et seq. and related state consumer protection statutes as well as relevant common law claims against American Residential Mortgage LP #XIV and/or American Residential Mortgage Limited Partnership” (the “Claims”). Pursuant to 11 U.S.C. § 541, all such Claims existing pre-petition claims became part of the Defendants’ bankruptcy estate.

10. According to the Answer, the Defendants “tendered funds to the Chapter 7 Trustee to purchase such claims.” Answer, ¶ 79. However, the Answer does not contend that Patti J. Sullivan (the “Trustee”) sold the Claims to the Defendants. On the contrary, the Defendants apparently concede that the Trustee has assigned, or has attempted to assign, those claims to ARM. See Answer ¶ 80.

The Counterclaims

11. Defendants raised four counterclaims in their Answer (the “Counterclaims”).

12. In Count I, the Defendants seek a finding that the TCF Note and TCF Mortgage were paid in full by the proceeds of the Cancelled Loan. Answer ¶¶ 63 & 69.

13. In Count II, Defendants seek an order requiring ARM to file a satisfaction of mortgage or that the Court enter an order having the effect of a satisfaction. Answer ¶¶ 75 & 76.

14. In Count III, Defendants challenge the Trustee’s assignment of the Claims to ARM because ARM lacks standing to actually assert the Claims in a court, should it wish to do

so. Answer ¶¶ 80 & 81. Further Defendants claim that their tender of funds to the trustee operates as an assignment of the claims to Defendants. Answer ¶ 82.

15. In Count IV, Defendants assert those Claims against ARM. Answer ¶¶ 91 & 92.

The Counterclaims Should Be Dismissed

16. Counts I and II fail to state a claim upon which relief may be granted because the Defendants cannot argue both that the Cancelled Loan was rescinded, therefore of no force and effect, and that the proceeds of the Cancelled Loan paid the TCF Note and satisfied the TCF Mortgage. Such arguments are mutually exclusive.

17. Count III fails to state a claim upon which relief may be granted because ARM may own the Claims despite lacking standing to ever assert the Claims. More importantly, the mere tender of funds to a bankruptcy trustee does not operate as a transfer of property of the estate to the party who tendered such funds.

18. Defendants lack standing to raise the Claims in Count IV because no matter whether the Claims were assigned to ARM, it is undisputed that the Trustee did not assign the Claims to the Defendants. Therefore, the Claims are either now owned by ARM or remain in the estate.

19. For these reasons, ARM seeks an order dismissing the Defendants' counterclaims.

20. Pursuant to Local Rule 9013-2(a)-(d), the facts set forth in this motion have been verified and the motion is accompanied by a memorandum of law, a proposed order and proof of service.

21. Pursuant to Local Rule 9013-2(c), ARM give notices that it may, if necessary, call Anne Weinberg, an employee of ARM, whose business address is 235 East Roselawn Avenue, Suite 13, Maplewood, MN 55117 to testify regarding this motion.

WHEREFORE, ARM moves the Court for an order dismissing the Counterclaims and granting such other relief as the Court deems just and equitable.

Date: September 20, 2004

/e/ Heather B. Thayer
Heather B. Thayer (#222549)
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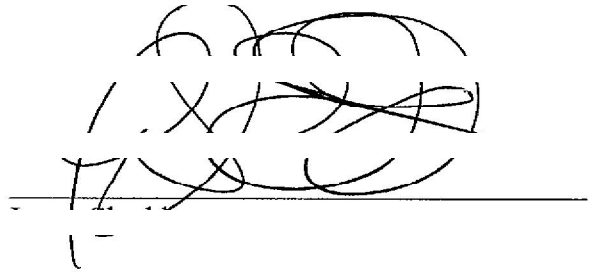
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I, Larry Shedd, am the Chief Executive Officer of American Residential Mortgage, L.P.

Based on my personal information and belief, I declare under penalty of perjury that the facts set forth in the preceding Motion are true and correct, according to the best of my knowledge, information and belief.

Dated: September 20, 2004

#3018584\1

A handwritten signature in black ink, appearing to read "Larry Shedd", is written over a horizontal line. The signature is stylized with loops and a large "X" in the middle.

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**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS**

INTRODUCTION

Plaintiff American Residential Mortgage, LP ("ARM") respectfully requests that the Court dismiss Defendants' Counterclaims (all capitalized terms not otherwise defined in this Memorandum have the meanings set forth in the Motion). Defendants fail to state any claim upon which relief can be granted. The Court should dismiss these counterclaims because:

- Defendants cannot, as a matter of law, contend both that the Cancelled Loan was rescinded and that the proceeds of that rescinded loan paid an earlier loan in full;
- Mere tender of funds to a bankruptcy trustee does not operate as an assignment of property of the estate to the party tendering such funds;

- An objection to sale of estate property is not properly asserted by bringing a claim in an adversary proceeding against the buyer of the claims;
- ARM's standing to sue on assigned Claims is irrelevant to the question of whether those claims were assigned to ARM; and
- Defendants lack standing to assert the Claims as Defendants do not own the rights to the Claims.

STATEMENT OF THE FACTS

The facts are set forth in the Motion.

ANALYSIS

A. Standard for Motion to Dismiss.

Federal Rule of Civil Procedure 12(b)(6), made applicable here by Federal Rule of Bankruptcy Procedure 7012(b), provides that the Court may dismiss a claim on motion for "failure to state a claim upon which relief may be granted." Defendants' counterclaims may be dismissed under Rule 12(b)(6) if it is clear that the Court can grant no relief under any set of facts that Defendants could prove consistent with their allegations. See DuBois v. Ford Motor Credit Company, 276 F.3d 1019, 1022 (8th Cir. 2002). Defendants' counterclaims must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal. Id.

Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326-327 (1989). In the present case, Defendants have not alleged any set of facts that demonstrate that they could be entitled to relief on any of their Counterclaims. Even if the Court takes all of the Defendants' allegations as true, Defendants

have come to unsupportable legal conclusions. The Court should dismiss Defendants' counterclaims under Rule 12(b)(6).

B. Rescission Restored the Parties to Their Pre-Rescission Positions, and Defendants Have Not Satisfied The TCF Note and TCF Mortgage.

Defendants have asserted legal conclusions that they cannot support in Counts I and II. The parties do not dispute most of the facts of the transaction between ARM and Defendants. For example, ARM recognizes that Defendants timely rescinded the Cancelled Loan on August 29, 2003. Rather, the dispute lies in the legal effect of Defendants' rescission. Defendants argue for the legal conclusion that the TCF Note and TCF Mortgage could be satisfied by proceeds of a loan that they themselves cancelled. Under Rule 12(b)(6), Counts I and II fail to state claims upon which relief may be granted, as there is no legal basis for this conclusion.

The provision for rescission under the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1635(b), aims to restore parties, as much as possible, to the position they held prior to entering into the transaction. Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1140 (11th Cir. 1992). Because the law of rescission returns the parties to the position they occupied prior to the rescission, Defendants' rescission of the Cancelled Loan nullified any payments from ARM to TCF on Defendants' behalf.

After the Thayers rescinded the Cancelled Loan, the TCF Note and Mortgage continued unpaid as Defendants cancelled the transaction that would have paid the TCF Note and Mortgage. There is no legal support for the assertion that Defendants may cancel the ARM loan and still claim that that loan satisfied the TCF Note and TCF Mortgage. Thus, Defendants are not entitled to any of the relief requested under Counts I and II and the Court should dismiss these counts.

C. The Mere Tender of Funds to a Trustee does Not Work as a Unilateral Assignment of Property of the Estate, the Issue of Whether the Trustee Could Sell Claims to ARM is Improperly Asserted in this Adversary Proceeding, and ARM Could Purchase the Claims.

In Count III, Defendants claim that the Trustee could not sell Defendants' claims under TILA and other consumer protection statutes (the "Claims") to ARM, and ARM could not purchase the Claims without having standing to assert them. Then the Defendants make the surprising assertion that their mere tender of funds to the Trustee "operates as an assignment of such claims effective August 27, 2004 (the date of the purported tender).

Section 541(a)(1) defines the "estate" as "comprised of all the following property, wherever located: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). As legal interests of the debtor, all causes of action become property of the estate under § 541(a) of the Bankruptcy Code. The bankruptcy trustee "may . . . sell . . . property of the estate." 11 U.S.C. § 363(b). Subsections (b) and (c) of Section 363 authorize the trustee to use, sell, or lease any "property of the estate," subject to certain conditions for the protection of creditors with an interest in the property. In re Colarusso, 295 B.R. 166, 172 (1st Cir. BAP 2003).

Leaving aside for the moment the question of whether ARM could purchase the Claims from the estate, there is no support whatsoever for the Defendants' assertion that they can, and have, unilaterally removed assets from the bankruptcy estate merely by purportedly tendering a purchase price for such assets. Mere tender of funds to a bankruptcy trustee does not operate as an assignment of assets of the estate. Section 363(b)(1) of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure 2002 and 6004, and Local Rules 2002-4 and 6004-1 provide the procedure for trustees selling assets of the estate.

Under Section 363(b)(1), “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 15 U.S.C. § 363(b)(1). Federal Rule of Bankruptcy Procedure 2002 requires 20 days notice to all creditors by mail of a proposed sale of property of the estate other than in the ordinary course of business. Fed. R. Bankr. P. 2002(a); see also Local Rule 2002-4(c)(1). However, under Local Rule 6004-1(a) the trustee may disregard the 20-day notice period by sending the notice directly and filing proof of service. In addition, when the trustee sells assets amounting to less than \$5000 in value, the trustee may satisfy notice by serving the U.S. Trustee, any party that has filed a request for notice and each member of any creditor’s committee. Local Rule 6004-1(b)(1).¹

None of these provisions, which require an affirmative act on the part of the trustee, support Defendants’ claim that tendering funds to a trustee operates as a unilateral assignment of assets of the estate. If mere tender were sufficient to operate as an assignment, buyers would have an incentive to submit the first bid and tender funds immediately, even if their tender was far less than the fair market value of the assets. Defendants’ theory would create a “race to tender” that would undermine the goal of maximizing the value of the estates’ assets. There is no support in the Bankruptcy Code for such a result, and this portion of Count III must be dismissed.

Moreover, if the Defendants had an objection to the sale of the Claims to ARM, that objection should have been asserted in the Defendant’s bankruptcy case since the objection is to a sale of assets by the Trustee in the main case – a sale in which Defendants participated, of which they were fully aware, and to which they filed no objection. Local Rule 6004(c) requires that any objection to a sale be filed and delivered not later than 12:00 p.m. the day before the

¹ The Trustee followed that procedure in this case in completing the sale of the Claims to ARM. If the trustee gives this limited notice, notice must be delivered seven days prior to the sale, or ten days if served by mail. Parties may then object. No objection to the sale to ARM was filed in this case.

proposed sale. Nowhere in the Federal or Local Bankruptcy Rules is there a provision that an objection to a sale is properly made by bringing an adversary proceeding against the buyer. Because this portion of Count III is not properly asserted in this adversary proceeding, it must be dismissed.

Finally, ARM is a proper purchaser of Defendants' claims. First, as stated above, the trustee has the power to sell property of the estate under Section 363(b)(1). Second, Defendants do not assert a legal basis for their contention that ARM could not own the Claims. The statute sections cited by Defendants do not anywhere limit the ability of non-consumers to hold claims. ARM admits that if it ever attempted to assert the Claims in a court, such an action might be dismissed on grounds of champerty; however, this relates only to the value of the Claims in the hands of ARM and does not go to whether the Claims are assignable. ARM was willing to purchase the Claims even though ARM recognized that its ability to assert those claims might be limited by law outside of the Bankruptcy Code. That does not change the fact that it did, in fact, purchase the Claims.

The Court should dismiss Count III as the Defendants' assertion that they can effect a unilateral transfer of estate property merely by tendering funds to the Trustee is wholly baseless. Moreover, the other assertions set forth in this Count are improperly brought in an adversary proceeding and lack any legal basis and must be dismissed.

D. It is Indisputable that Defendants Do Not Own the TILA Claims and Lack Standing to Assert Those Claims.

As set forth above, as a matter of law, and based upon the facts as set forth in the Defendants' Answer, it is clear that Defendants do not own the claims they assert against ARM in Count IV of the Answer. Without owning the claims, Defendants lack standing to assert those

claims. Elk Grove Unified School Dist. v. Newdow, 124 S. Ct. 2301, 2309 (2004) (stating that prudential standing includes a “general prohibition on a litigant's raising another person's legal rights . . .”). As discussed above, the Defendants’ purported tender of funds to the Trustee for the Claims does not act as a unilateral transfer of the Claims to the Defendants. Therefore, the Defendants do not own the claims and lack standing to bring the claims in Count IV.

Even if the Court reversed ARM’s purchase of the claims in Count III, the claims would not then belong to the Defendants. Rather, those claims would revert to the Trustee and the bankruptcy estate. Under either result, the Defendants still do not own the Claims. Therefore, the Court must dismiss Count IV as Defendants lack standing to assert claims that they do not own.

CONCLUSION

For the above reasons, Defendants have asserted counterclaims that fail to state claims upon which relief may be granted. ARM respectfully requests that the Court enter an order dismissing all of Defendants’ Counterclaims.

Date: September 20, 2004

/e/ Heather B. Thayer
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Attorneys for American Residential
Mortgage, LP

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CERTIFICATE OF SERVICE

Heather B. Thayer, under penalty of perjury, states that on September 20, 2004, she caused to be served the following:

1. Plaintiff's Motion to Dismiss Defendants' Counterclaims;
2. Plaintiff's Memorandum of Law in Support of Motion to Dismiss Defendants' Counterclaims;
3. Proposed Order Dismissing Defendants' Counterclaims; and
4. Certificate of Service.

by United States mail at Minneapolis, Minnesota with postage prepaid, by .sending true and correct copies thereof to:

Karl Oliver
The Oliver Group, PLC
1935 W. County Road B2, Suite 415
Saint Paul, Minnesota 55113

Dated: September 20, 2004

/e/ Heather B. Thayer
Heather B. Thayer

#3018591\1

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PROPOSED ORDER DISMISSING DEFENDANTS' COUNTERCLAIMS

The Plaintiff's Motion to Dismiss Defendants' Counterclaims came before the undersigned on October 25, 2004. Appearances, if any, are noted on the record.

Based on the arguments of counsel, all the files, records and proceedings herein, the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. Plaintiff's Motion to Dismiss Defendants' Counterclaims is GRANTED; and
2. Defendants' counterclaims against Plaintiff, American Residential Mortgage, are dismissed.

Dated: _____, 2004

United States Bankruptcy Judge